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No. ---DECEMBER TERM. A. D. 1859.

UNITED STATES.

SUPREME COURT

JOHN DREDGE, JOHN A. KEYES, JESSE HESTER,
CHARLES BALLANCE

vs.

ROBERT FORSYTH

IN ERROR TO THE

NORTHERN DISTRICT OF ILLINOIS.

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IN THE UNITED STATES SUPREME COURT.

No. ...DECEMBER TERM, 1859.

John Dredge, John A. Keys, Jesse Hester,
and Charles Ballance.

versus
Robert Forsyth.

IN ERROR TO THE NORTHERN DISTRICT OF ILLINOIS.

This was an action of ejectment, brought by said Forsyth against said Dredge, Keys and Hester, as tenants in possession, for a certain portion of the French claim marked on Brown's plat with both the numbers 62 and 63.

The declaration and notice were served on the 9th of July, 1855. Ballance, as landlord, was afterwards, by consent, admitted as a co-defendant. Judgment and verdict were for plaintiff below.

The declaration claimed: "That part of the claims forty-five and sixty-nine, and part of the claims sixty-two and sixty-three, in the village of Peoria," &c., and then there is a description by metes and bounds. The verdict and judgment are for "so much of claim sixty-three, confirmed to Antoine Lapance," &c., "as is covered by the South-westerly half of lot No. one, in block forty-seven, in Ballance's Addition to the town of Peoria," without any metes and bounds being given.

Plaintiff below, to sustain the issue on his part, introduced in evidence:

1st. A patent to the legal representatives of Antoine Lapance, for claim No. 63, dated Feb. 1st, 1847.

2d. The Act of Congress of May 15th, 1820.

3d. The Act of Congress of March 3d, 1823.

4th. A plat of the whole French village of Peoria, as surveyed by Joseph C. Brown, and approved by the Surveyor General, on the first of Sept., 1840. Objection was made to this plat because it was not testified to by the proper officer, but the objection was overruled.

5th. A plat of French claim No. 63, which was objected for the same reason, but the objection overruled. Upon this plat is written: "This lot contains 27,449 square feet and $\frac{7}{100}$ of a square foot of land, equal to 24,000 square feet, French measure, and it is also confirmed to Simon Bertrand (see claim No. 62), the survey of which is identical with this survey.

6th. He then read, in evidence, so much of Cole's report as has any reference to claim 63, from third vol. American State Papers, a printed volume purporting, on its title page, to have been "selected and edited under the authority of the Senate of the United States, by Walter Lowrie, Secretary of the Senate, and printed by Duff Green,"—to the reading of which, defendant objected, but the Court overruled said objection.

7th. A deed from Glodon and wife, and Lecompt and wife, to Laurant Penconneau. The land conveyed in this deed, is described as a lot confirmed to one *Lapeur*, and bounded northwardly by one *Burnete*. There is no other definite description in it.

This is not an original, but a copy, and it was given in evidence on Forsyth's affidavit that "he has had possession of the same; that it went into the possession of deponents attorneys, Manning & Merriman, and that he is informed by them that the same is lost."

He then read sundry deeds conveying all the interest of Elizabeth Penconneau, Louis P. Penconneau, Mary Louise Byrne.

Francis Pençonneau, Paschal Pençonneau, Narcisse Pençonneau, Edward Pençonneau, and Charles Pençonneau, in the premises in dispute, to plaintiff below.

15th. His fifteenth item of evidence, was a voluminous chancery proceeding, by which it is made to assume that by virtue of the foregoing deeds, plaintiff is invested with two undivided thirds of said lot No. 63, and an infant, John Hebert, of one undivided fourth part of it, and Joseph Trotier, with one twenty-fourth part, and Adale Paran and Amable Trumble (an infant), with one twenty-fourth part, but that as the property could not be divided without injury, a sale was decreed, at which sale, plaintiff below became the purchaser for the consideration of one hundred dollars, and a deed accordingly, was made unto him, by direction of the Court.

To give an abstract of this record, would take up more space than I am willing to devote to it; and I presume a few notes and references to it will be sufficient.

To show complainants right, the petition makes one exhibit of the same deed from Glodon and wife, and Lecompte and wife, containing the same defective description.

The petition on page 20, represents Mary Louisa Byrne as being one of the heirs at law of Laurant Pençonneau, the property last seized, and on page 24, it is said that she conveyed all her interest to Narcisse Pençonneau, on page 25 a copy of the deed is given, by which the conveyance is supposed to be effected. This deed describes her as "Mary Louise Byrnes, late Mary Louisa Valentine, one of the heirs of the late Laurant Pençonneau," and the ground is described not by a number, nor by metes and bounds, but as the ground bought by the late Laurant Pençonneau, of the heirs of the late Antoine Lapance.

All the evidence in the case, to identify her as one of the heirs of Laurant Pençonneau is on page 46, and is as follows: "These three sisters were first Mary Louisa, who married John Valentine, and died leaving only one child, named Mary Louise Valentine, who afterwards married Ortane Byrnes, and was divorced from him before the year 1846." Nor is there any

other evidence in the record, showing that she had been divorced.

The service of the process is on page 36, it appears to have been served on all "except Joseph Trotier, who was not found; but left a copy of the within, at his usual residence with a white person over the age of ten years, and informing her of its contents."

There was no answers for the minors, nor in fact for any of the defendants, but N. Pençonneau, the guardian of one of them acknowledge service, and was then the only witness to prove the case against his ward.

The case (page 37) was referred to the master, "to take proofs of the truth of the allegations contained in the petition, in this case, and that he report to this court immediately thereon." The report, however, does not contain any evidence, but it simply responds to the facts, as set forth in the bill. The decree on page 38, recites that it had been "referred for the purpose of taking proofs of the truth of the allegations in the petition in this case, filed and reporting them to the Court."

N. Pençonneau (page 46) proves a deed executed by one Godin, not the one given in evidence, for it is signed by one Glodon.

The only evidence upon which a copy of Louis P. Pençonneau's deed was let in, is contained in N. Pençonneau's deposition, one page 47, and is as follows: "I have in my possession the original deed from Louis P. Pençonneau and his wife Sarah S., of which the annexed deed marked B. is a copy from the records. The original is lost or mislaid. I have searched for the original where it ought to be, but cannot find it after search."

The decree (page 41) is that the lot "be sold by George S. Blakely, master in chancery, of Peoria county, who is hereby appointed commissioner for that purpose; that said sale be made by said commissioner, on Saturday the twentieth day of January, A.D. 1855, at the front door of the Court house, in the city of Peoria, between the hours of ten o'clock, A. M., and

four o'clock P. M., of said day, he the said commissioner first giving three weeks notice of the time, place and terms of said sale, by three successive weekly advertisements thereof, in some newspaper printed and published in Peoria county." The return on page 42 says: "He did, on the twenty-eighth day of December, A.D. 1854, advertise the premises in said decree described, in the *Peoria Republican*, a newspaper published in Peoria."

Here plaintiff below rested, and defendant in the first place, moved the Court to exclude from the consideration of the jury, said patent to the legal representatives of Lapance, which motion the Court overruled.

2d. He gave, in evidence, the Receiver's receipt, showing that defendant, Ballance, on the 27th of November, 1837, bought from the United States (and paid the usual price), the s. w. of sec. 9, t. 8 n., r. 8 e.

3d. He read the Register's certificate, which is as follows:

"UNITED STATES LAND OFFICE, Quincy, Illinois.
27th November, 1837.

I do hereby certify that Charles Ballance, of Peoria county, in the State of Illinois, did this day enter, or purchase, at this office, the Southwest fractional quarter of fractional section No. 9, in township No. 8 North, or range No. 8 east, of the 4th principal meridian, containing one hundred and forty-seven $\frac{48}{100}$ acres. Certificate No. 13,293, as appears of record in this office.

SAMUEL LEECH, *Register.*"

4th. He gave in evidence a patent from the United States to Charles Ballance, for said quarter section, dated January 24th, 1838. This patent is precisely like the one under discussion, in the case of Bryan and Rouse *vs.* Forsyth. Like that, it has in the habendum the following words interlined, "subject, however, to the rights of any and all persons claiming under the act of Congress of 3d March, 1823," &c.

5th. He gave in evidence the original plat of Ballance's Addition to Peoria, which is not copied into the printed record.

but may be found in the manuscript record, page 105. This plat bears date February 10th, 1846.

6th. The deposition of A. S. Cole. He says: "I have lived in the town and city of Peoria twenty-one years, and have been acquainted with Charles Ballance for the same number of years. I am acquainted with the southwest fractional quarter of section nine, in township eight North, of range eight east, of the fourth principal meridian."

In the fore part of the year 1844, I leased part of said quarter from Mr. Ballance. The part I leased is now known as lot 3, in block 47, in Ballance's Addition to Peoria, and being two hundred feet front, on the Peoria and Oquawka Railroad, and extending back to the river."

"In February 1844, I commenced building a distillery on the ground or lot leased from Ballance, and completed it, and had it running in September of that year. I occupied the lot, distillery and out-buildings, about two years and a half, when I sold to Sylvanus Thompson, and assigned the lease to him. Thompson took possession at the time I sold and assigned to him, and kept possession until his death."

"Richard Gregg married one of Thompson's daughters, during the time Thompson occupied said premises. Richard Gregg, one of the defendants in this suit, and son-in-law of Thompson, was in possession with Thompson, either as partner or clerk; and said Gregg remained in possession until about a year ago."

"At the time I leased of Ballance, the lot leased was reinclosed. I fenced it after I leased it."

7th. The deposition of Metcalf—wiiness says: "I reside in the city and county of Peoria, in the State of Illinois. I am an attorney at law, in this state, and have been for nearly twenty years. Further, Charles Ballance has always held adversely to all French claims, and that more than fifteen years ago he procured an affidavit from me to use in resisting and overturning all their claims."

9th. The deposition of A. Moffatt: "I have lived near the city of Peoria for thirty-five years. I have been well acquainted with Charles Ballance since 1832. I know that Ballance resides on the southwest fractional quarter of section nine, in township eight north, of range eight east, of the fourth principal meridian, in the city and county of Peoria and state of Illinois. He has resided on that fractional quarter since June, 1844. He was engaged a couple of years in building his house before he moved into it, and before June, 1844."

"Ballance claimed to be the owner of said fractional quarter, and was in possession of the same as early as 1832, and has cultivated parts of it from 1832 to the present time. Ballance moved from the yellow house on the southeast fractional quarter of the same section into the house he now occupies, situate on the southwest fractional quarter."

On cross-examination:

"In 1832 Ballance had about half an acre enclosed on the southwest fractional quarter, and had the same in cultivation. The enclosure was above the road, now Water street, and about opposite, but a little above, the Peoria and Oquawka Railroad Co.'s depot.

"In 1832 he had no other enclosure on said fractional quarter that I know of. At the time Ballance built his house he had twenty acres, and perhaps considerably more enclosed. The large enclosure was between Adams street and Water street, and includes the small one. At one time Ballance's fence on the upper side of said inclosure, and lower line of said quarter section extended across Water street and down to the river bank, so that the river bank constituted a part his enclosure. As near as I can recollect, it was after Ballance moved into his present dwelling. The enclosure was below the distillery, formerly occupied by A. S. Cole."

10th. Deposition of N. H. McKean: "I first came to Peoria in September, A. D. 1837. I have known Charles Ballance since 1838. I have been acquainted with the southwest quarter of section nine, in township eight north, of range eight east, in the

city and county of Peoria, and state of Illinois, since April 1st, 1839. Between the first day of April, and the tenth day of that month, in the year 1839, I moved on to said quarter with my family, and lived thereon until the spring of 1854, except about six months in 1843. I first went on to said quarter in April, 1839, as a tenant under said Ballance. At that time Ballance had about six acres enclosed on that quarter, and in 1840 Ballance had enclosed from twenty-two to twenty-four acres on said quarter. The six acres enclosed were between Water street and Washington street. The six acres were cultivated in 1839, and from appearances I judged the six acres were enclosed some three years before".

"Ballance, prior to April, 1839, had a pasture lot between the six acre lot and the river, that had been fenced. At that time, viz: April, 1839, Ballance had a double frame dwelling house on said quarter, calculated for two families. I moved into the double house and continued to live therein with my family, until the fall of 1841. There were three families in said house, as tenants under said Ballance. The house I moved into stood on what is now called Water street, in the city of Peoria, and also the Peoria and Oquawka railroad, and I judge less than one hundred yards above the distillery built by A. S. Cole, and for years afterward occupied by Richard Gregg, the defendant."

"I continued on said quarter as Ballance's tenant for five years from April, 1839. Said twenty-two acres enclosed was cultivated in 1840, and has been cultivated and occupied by Ballance and those holding under and through him from 1840 to the present time. During the time I moved out of said house in 1843, I had tenants residing therein with their families.

"Since I came to Peoria Ballance has had tenants living on said quarter section continuously, and of late years he had a considerable number of them. Ballance at first lived on an adjoining quarter section, but about the year 1842 he commenced building the house he now lives in, which is a large and expensive brick residence. In 1842 I dug the cellar. In the early part of 1844 he moved into it with his family, and has continued to reside therein since."

"At the time I moved on to said quarter in 1839, the fences around the field were old and dilapidated, so that they required considerable repairs before I could raise a crop. Said field was all on the upper side of the railroad or Water street, but the ground between that and the river had manifestly been fenced in, for part of the fencing materials between that and the river were still on the ground, and I, in the employment of said Ballance, removed them in the enlarging of said field. Said Ballance afterward employed another man, Elias Wood I believe, to fence in said land again by itself as a pasture, it being woodland. However, this part of said tract of land has, for several years, been thrown open and built upon by persons claiming under said Ballance. I remember well when A. S. Cole built a distillery on said tract, for I assisted him in getting the lumber for the same. And I remember that Jacob Lorentz was then, and for some time previously thereto, had been in possession under said Ballance, of the portion of said tract lying between Water street and the river, and above that part occupied by said Cole. Said Lorentz was a man of a family and lived on said land, and also had a slaughter house on it. Said Lorentz was living in a house on said quarter section belonging to said Ballance, when I went to live in Peoria, and lived in it until he built his own house, between the river and Water street, and he continued to live in said last mentioned house until he sold to one A. W. S. Goodwin, and gave him possession. I know of Goodwin living on said lot and carrying on the lard oil and candle business for several years thereafter. At one time said Goodwin only claimed to own a portion of said ground above where Cole built his distillery, because I had a title bond from Ballance for part, which I afterward transferred to said Goodwin; but before said transfer of said land, said Goodwin occupied it with the consent of said Ballance and myself. Said Ballance claimed said quarter on which his said farm was situated in his own right, and adversely to all the world, but particularly to that class of claims called French claims."

11th. Deposition of Jacob Lorentz: "I am acquainted with the southwest quarter of section nine, township eight north, range eight east of the fourth principal meridian, on which Bal-

lance's addition to Peoria is located. I lived on a part of this ground. I had possession of it before I lived on it. There was an old slaughter house on it—an old log house which I used as a slaughter house. This was in 1838. I got the possession of Mr. Ballance. The piece of ground marked on Ballance's addition as lot two, in block forty-seven, is the piece of ground on which I had the slaughter house. The slaughter house was on the end toward the river. There was a picket fence on the upper side of the tract above Water street."

"In the spring of 1839 I fenced lot two off to itself by a good post and rail fence, and built a slaughter house in the spring of 1839, on that portion toward the river. I would not swear positively when the dwelling house thereon was built. I think it was in 1839 or 1840. I moved into the dwelling house in 1840, and resided there constantly till late in the fall of 1843, when I moved off. I conveyed to Goodwin, and gave possession to him. Goodwin was a man of family, and resided in that house, and lost one child to my knowledge. I cannot state positively how long Goodwin resided there, but think he was there three years—am not positive. I never saw the house empty since. For anything I know it has been occupied all the time. While I lived below town, I passed there on an average three times a week. Knew of Mr. Tritchler using the slaughter house and soap factory. I understood from Tritchler, while he occupied the lot, that he held under Goodwin. After Tritchler was gone, I asked the tenant who owned the property. He said, "Mr. Goodwin." I was Mr. Ballance's tenant before I built my house. At the same time I was occupying lot two, I lived in a house above Water street, on the same quarter section, where lots seven and eight, block forty-three now are. I lived in a house upon said lots as the tenant of said Ballance. This house is still standing. That was in 1839. The old log house which I first occupied as a slaughter house was built when I came to the country. It stood in the centre of what is now lot one, on the river bank. In 1838 I built a temporary enclosure for cattle, around a block and a half, in which lot two, block forty-seven now is. It went some distance below. In the spring of 1839 that fence was taken away, and I built a permanent fence

around lot two. When I came there, there had been some fencing below Cole's distillery. There were some remains of it running from Water street into the river. I saw a fence built on the lower line of that fraction and across Water street. The land was enclosed and had gates on it. These fences joined Ballance's enclosure above the railroad. There was an enclosure around the house I first lived in, on block forty-three ; that was cultivated that year. That house, for anything I know, has always been occupied ever since. I never heard anybody dispute Mr. Ballance's right to it. The front part of lot two, block forty-seven, I cultivated as a garden. The other part next to the river I occupied as a slaughter house. The slaughter house stood on the river bank. I made a division fence between the slaughter house and the dwelling house. They were connected by gates. There was a smoke house built by Goodwin, which I think is there yet. It stood about the centre of the whole piece of ground, and on the slaughter house portion of the lot."

On cross-examination he said :

"Don't think there was anybody residing on the slaughter house portion of the lot two years ago. Nobody ever lived on that portion of the lot, I think. Don't know of anybody living there. Don't know who occupied it two years ago. Don't know who occupied any of lot two since the fire, which was three or four years ago. I think I moved into town in the spring of 1848 from below town. To the best of my knowledge, Tritchler went in when Goodwin went out. I think the inclosure referred to by Mr. Ballance was built somewhere from 1841 to 1844. I think it was not kept up after 1844 ; part of it went away in that year. The slaughter house portion of the lot, I think, has not been enclosed since the fire. Part of the fence is there yet."

Direct Examination.—"I have lived in and near the city of Peoria, ever since the year 1838. The man I found there in the dwelling house, of whom I enquired who owned the lot, after Tritchler left, I took to be an Irishman. I know it was not Tritchler."

12th. *Stebbins' Deposition.*—Clark B. Stebbins testified that he had resided in Peoria since July 1, 1845. Is well acquainted with the southwest quarter of section number nine, of township eight, north of range eight, east of the fourth principal meridian. Am well acquainted with A. S. W. Goodwin. He was a man of family, and was residing on lot two, of block forty-seven, of Ballance's Addition to Peoria, as is now understood and described. Thinks said Goodwin lived there nearly three years, after witness came to live in Peoria. He removed from there and lived awhile on Adams and Jefferson streets in Peoria, and then removed to St. Louis, where he has lived ever since. Thinks he moved to St. Louis in the fall of 1849. A man by the name of Tritchler took possession before he left for St. Louis, of the end of lot two next the river, and occupied it till it burned, I think in 1851. It was used as a soap and candle factory, and for the manufacture of lard oil, and for the slaughtering business, and between these and the house on the front end of the lot was a smoke house for curing hams; also a hog pen, also occupied by Tritchler. Thinks he occupied them two years, from 1849 to 1851. From the time Goodwin left in 1849, witness had the agency of said property, to collect rents and pay taxes, both of lot two and the southwesterly half of lot one, of block forty-seven, in Ballance's Addition. So far as I can recollect, the house on lot two has never been vacant, but has been occupied by tenants of Goodwin. That part of lot two, on which the factory stood, has not been enclosed by a fence since the fire. The house was on one end of the lot and the factory on the other.

The smoke house is on the lot yet. Witness continued to exercise acts of ownership over the back part of the lot, after the fire, the same as before, and had the smoke house locked, after the fire, & kept the key and rented the house to Jesse L. Knowlton for the purpose of curing hams. Knowlton was in possession of it in the summer of 1855. Thomas Meehan was in possession of the dwelling house. Witness leased it to him as agent of the said Goodwin. Witness had authority from said Goodwin to take charge of both lots, that is southwest half of lot one and lot two, and in pursuance of his authority, did take the charge of and pay taxes on both. He knows the

taxes were all paid from having paid them himself, while he was Goodwin's agent, and from having seen the tax receipts for those paid by Goodwin, before he was agent. Has not possession of Goodwin's deeds or tax receipts. He knows Dredge, Hester and Keys, who have a furniture factory on the northwesterly half of lot one, and who piled lumber on the ground in dispute, with my consent. They had a factory worked by steam, that extended to the line dividing the portion of the lot occupied by them, and the lot belonging to Goodwin."

On cross-examination—Goodwin resided on lot two, in July, 1855, when witness came to Peoria, and resided there, I think, three years, when he removed either to Adams street or Jefferson street, where he resided until 1849. The first tenant of the house occupied it a month, when Tritchler occupied the factory, he did not live on an adjoining lot, nor on this lot two, unless it might have been one month, when he may have lived in the house on lot two. He was a man of a family, and resided somewhere in the neighborhood, but witness does not know where. Dredge occupied the southwest half of lot one by piling lumber on it, with witness consent, and agreed to pay eight dollars per year, for the privilege. Don't know of paying taxes of 1849, did pay taxes of 1850.

I was agent of different parties for paying taxes. It often happened that taxes that I had to pay for my principals, had been paid. I know nothing of payment of taxes, except that I paid all that I was called on for, on the lists in my hands. Lot one was never enclosed.

13th. A deed from Ballance to Lorentz, dated April 13th, 1840, for the ground by metes and bounds that was afterwards surveyed and numbered as lot two.

14th. A deed from Ballance to Goodwin dated May 12th, 1848, for the South half of lot one.

15th. A tax record, by which it appears that by reason of the non-payment of the taxes due for the year, 1845, on a certain tract of 105 acres of land, including the lot in controversy, nine acres of said tract of the East side, also including the lot

in controversy, were sold by the Sheriff of Peoria county, and bought by said Ballance. This record shows a regular judgment, process and Sheriff's deed. The latter bears date of Nov. 10th, 1850."

Here defendant closed and plaintiff below, proved by A. F. Lincoln, "that he was in occupancy of the northeast half of lot one, in block 47, of Ballance's addition, as a manufactory of furniture. We leased this ground in the fall of 1857, of Mr. Ballance. In the spring of 1853, the soap, oil and slaughtering establishment was destroyed by fire."

"In the spring of 1855, we (Fridley & Lincoln), sold out to Dredge, Hester and Keys and gave the possession of our establishment to them. Previously to wit: in the fall of 1854, Forsyth the plaintiff here, called on us, (Fridley & Lincoln) and wished to know if we were occupying, or wished to occupy, the southwest half of said lot. We told him we had not leased it of any one. He said he would lease it to us. We accepted a verbal lease from Forsyth, after the soap factory was burned down. We occupied until the spring of 1855, when we sold out to Dredge, Hester & Keys. This ground has never been occupied since he has been there by any one, occupying Goodwin's house."

On cross-examination, he says:

"It was the firm of Fridley & Lincoln that leased said northeast half of lot one, from said Ballance, and in 1855 they sold their establishment to Dredge, Hester & Keys. Ballance sold the portion they had leased from him, to Robert Forsyth, the plaintiff, and then they became his tenants. William Kellogg, now claims the property under the Ballance title."

"He (witness), never told Ballance, Goodwin or Stebbins, that he designed to claim said property under Forsyth's adverse title."

He then introduced a paper signed C. Ballance, which expressed a willingness to enter said southwest quarter, subject to the rights of all French claimants.

Also, a plat showing the connection of French claim 63, with block 47, of Ballance's addition, which may be found on page 155, of the manuscript record.

Plaintiff below, then called said Lincoln, again, who said, "he had, at one time, occupied the smoke house, in said lot two, to put chairs in. He found it unoccupied and unlocked. He put a lock on it, and kept it locked two or three months."

Said Stebbins again called, said, "that said Goodwin had occupied said smoke house in connexion with his factory, and had a lock on it."

"Some one forcibly broke the lock. He afterwards put on the door of said house another lock, which, after some time, was also broken off. He then, in the spring of 1855, leased said house to Jesse L. Knowlton, who put another lock on it, and went into possession. Witness never knew of said Fridley & Lincoln putting any lumber on said premises. If they ever did so it was without his permission, and against his will."

Said lot two was so situated that no access could be had to any portion back of the dwelling, including the oil and soap factory, butchering establishment, smoke house, pig pen and cow shed, without passing over the strips of ground called the southeast half of lot one, in said block 47."

Whereupon defendant below asked the Court to instruct the jury :

1st. That the titles exhibited by the defendants is superior in point of law, to that exhibited by plaintiff.

2d. That the title of the defendant is a regular chain of title, deducible of record from the United States, and if they believe, from the evidence, that defendants, and those under whom they received the possession, had been in the actual possession, by residence, of the premises in dispute, more than seven years, immediately preceding the commencement of this suit, and were still in such possession, when this suit was brought, then plaintiff is not entitled to recover in this suit.

3d. That actual possession, by residence, does not mean that the party shall have his house on the particular spot or parcel of ground, plaintiff has thought proper to sue for, but if they believe, from the evidence, that said Goodwin bought lot two, in block forty-seven of said Ballance's addition to Peoria, for the purpose of carrying on butchering, and making soap, lard, oil and candles, and that the establishment for such purposes was on the back part of said lot, and the dwelling house and garden on the front part, and the hog-pen and cow-stable between them, and there was no access to the back part of said lot only by going over the ground in dispute, and that said Goodwin bought that ground in, after he bought the other, and was in possession for the purpose of giving him access to it, and that said Goodwin, and those claiming under him, did so occupy it, in connection with the part they lived on, as an appurtenance to it, they were, in contemplation of law, in the actual possession thereof by residence.

4th. That it is a question of law, well settled, that if a man buys and resides on a tract of land, and while in such possession, buys another tract adjoining his possession, in contemplation of law, at once extends over the new purchase, and it becomes a part of his residence.

5th. That if they believe, from the evidence, that said Goodwin, and those claiming under him, had buildings and fences on said lot two, and actually occupied it, and at the same time, under deed from said Ballance, exercised acts of ownership over said lot one in dispute, by claiming it and passing it as the only accessible way of getting to their said work on said lot two; in short, that if they constantly used it in such a way as for their business, it was to their interest, in their opinion, to use it for more than seven years, before the commencement of this suit: and if they further believe, that during all said seven years they paid all taxes that were assessed on said strip of ground in controversy, then the plaintiff cannot recover in this action.

6th. That the tax title presented to defendant is an absolute title in fee simple, to the ground in dispute, if in their opinion, it covers the same.

8th. That in proving the payment of taxes, it is not necessary to produce any tax receipt ; it is sufficient if it be proved by any credible witness who knows the fact.

9th. Although a survey may be necessary to locate and complete the title of claimants under said law of 1823, when the same was not bounded and located by said report of Register Coles, in this case, where the claim was definitely located and bounded by said report, no survey was necessary, and as a consequence, the title vested on the passage of said law of 1823, and the statute of limitations of twenty years, would commence running from the date of said law:

10th. That the phrase "good faith," in the statute of limitations of 1839, means, simply, the absence of fraud in fact ; that although the jury may believe, from the evidence, that said Ballance always knew of the claim under the act of 1823, he is not guilty of want of "good faith" within said statute, unless said Ballance had been guilty of some act of bad faith towards defendant's title.

11th. That whatever they may think of said Ballance's conduct, yet as he had sold the premises in dispute, to Goodwin, more than seven years before the suit was commenced, it is necessary that bad faith be shown in said Goodwin, to affect the defence under said law of 1839.

12th. That said Dredge, Hester & Keys having taken a lease under Goodwin's title, it was not competent for them afterwards to "attain" to plaintiff, and said witness, Lincoln, having afterwards bought an interest in the firm of said Dredge & Co., he was in the same attitude as to the matter of possession.

Which instructions, in the manner asked, the Court refused to give, but instructed the jury substantially, as follows :

Instructions of the Court to the jury :—

FORSYTH, }
 vs. }
DREDGE, et. al. }

1st. The Acts of Congress, of 1820 & '23, in connection, both

the report of the Register, the survey in 1837, approved in September, 1840, and the patent of February 1st, 1847, conveyed the legal title of French claim No. 63, to the legal representatives of Antoine Lapance; the grant took effect, as to location, from the time of the approval of the survey.

2d. By the papers introduced, in evidence, on the part of the defence, Ballance acquired no absolute title to French claim 63. The other title, under the act of 1823, was the paramount title.

3d. In order to be protected, under the law of 1835, Ballance, or those claiming under him, must have had possession by actual residence, on the land in controversy, for seven years next preceding the commencement of this suit.

4th. The Supreme Court of the United States have recently decided that a party holding such a title as the defendants show in this case, had the kind of title required by the statute.

5th. Whether or not there was an actual residence for seven years, was a question exclusively for the jury.

6th. If Ballance had his house on one part of the quarter, and his improvements extended over and included lot 63, so as to be connected with his residence and to form a part thereof, or it was used in connection therewith, that would, within the meaning of the law, constitute actual residence. If Ballance built on one part of the quarter, and this lot 63 was vacant, unoccupied and unimproved, it would not as to that lot, constitute an actual residence.

If Ballance's tenants, or those claiming under him actually resided on a lot adjoining lot 63, for seven years immediately preceding the commencement of this suit, and during all that time occupied lot 63, as a place of business, and connected with their actual residence, that would constitute a residence within the meaning of the law as to this lot in controversy.

It was proper for the jury to consider the circumstance of the subdivision of the land in blocks and lots by Mr. Ballance, in April 1846, and whether that, in connection with the other facts in the case, constitute a severance of the lots and blocks so subdivided.

7th. It was for the jury to determine whether the facts and circumstances in evidence made Ballance, or those claiming under him, actual residents of the lot in controversy, for seven

years before the commencement of this suit. If they did, then the defendants were within the protection of the act of 1835, otherwise not.

8th. The Court refused to instruct the jury that the tax title introduced in evidence by the defendants, was an absolute title, but instructed the jury that possession of the land in controversy by Ballance, or those claiming under him, for seven years next before the commencement of this suit, under a claim and color of title, made in good faith, together with the payment of all taxes on the land, for that time, would defeat the plaintiff's case. That of good faith the jury were to judge. That the payment of taxes might be proved otherwise than by tax receipts.

To all of which said decisions and rulings of the Court, defendant then and there excepted, and prays that this, his bill of exceptions be sealed, signed, and made record, which is done.

THOMAS DRUMMOND. (L.S.)

I rely on the following points and authorities to reverse said judgment :

1st. Said plats of the French village and of lot 63, were not legal evidence, because by the law of March 3d, 1823, (3 stat. at length, 786,) the surveys were required to be returned to the Secretary of the Treasury, and to him they were returned, and there they are yet : but the Surveyor at St. Louis copied them into a book, and from this book those given in evidence were copied. They are, therefore, at best, but copies of copies, and not the best evidence that was within the power of the party.

2d. If these plats should be given in evidence, the latter one would be fatal to plaintiff below, for instead of it showing that this lot was confirmed to Antoine Lapance alone, it shows that it was also confirmed to Simon Bertrand. Of course, as the survey and not the patent constitutes the title, as was decided in the Bryan & Ronse vs. Forsyth. 18 How. 334, and Ballance vs. Tesson et. al. 12 Ill. 326, a judgment for an entire lot, cannot be sustained by evidence which shows that another has an equal interest.

3d. The book given in evidence as vol. 3 of American state papers was not legal evidence. It is a book which purports to have been " selected and edited under the authority of the U.

S. Senate, (alone) by Walter Lowrie, Secretary of the Senate, and printed by *Duff Green*;" whereas, the book in the law library, and which was given in evidence, in the case of Watkins vs. Holman, 16 Pet. 35, and Bryan & Rouse vs. Forsyth, 19 How. 338, is a volume of documents, published by order of both Houses of Congress, and "selected and edited under authority of Congress, by Walter Lowrie, Secretary of the Senate, and *Walter S. Franklin*, Clerk of the House of Representatives, and published by *Gales & Seaton*." There is no law making either of these books evidence, but that which was prepared by the Secretary of the Senate and Clerk of the House, jointly, under an order of *Congress*, and printed by the accredited agent of the government, the public printer, might well be evidence, and that gotten up on private speculation, and printed by *Duff Green*, not evidence, although the Secretary of the Senate may have prepared it.

4th. But how is the Court to know the contents of this book? It is not in the library at Washington, and its contents are not copied into the record, yet it will not be pretended that plaintiff below could not succeed without it.

5th. The deed from Glodon and wife, and Lecompt and wife, to Penconneau was clearly bad, because it was not for the ground in suit: and were it for the right of ground, it was error to give in evidence a copy, without further evidence of the loss of the original. To let in this copy, Forsyth swears that the deed went into the possession of defendants attorneys, Manning & Merriman, and that he is informed by them that the same is lost." Suppose that when this deed was handed over to these attorneys, to prosecute this suit, they had seen on its face, such erasures or other evidence of fraud as would invalidate it, and they had said: "Sir, it will never do to let this deed appear in Court, it will destroy your case but we see it has been recorded: we say to you "it is lost." Here is a copy which does not show the interlineations, and you must swear to an affidavit, which we will attach to it, stating that the original went into our hands, and that you had heard us say it was lost. Here would be a fraud, precisely such as the above decision would sustain.

6th. The deed from Mrs. Byrne conveys nothing: 1st. Because it contains no description that includes this property.



S. Senate, (alone) by Walter Lowrie, Secretary of the Senate, and printed by *Duff Green*;" whereas, the book in the law library, and which was given in evidence in the case of Watkins vs. Holman, 16 Pet., 35, and Bryan & Rouse vs. Forsyth, 19 How., 338, is a volume of documents, published by order of both Houses of Congress, and "selected and edited under authority of *Congress*, by Walter Lowrie, Secretary of the Senate, and *Walter S. Franklin*, Clerk of the House of Representatives, and published by *Gales & Seaton*." There is no law making either of these books evidence, but that which was prepared by the Secretary of the Senate and Clerk of the House, jointly, under an order of *Congress*, and printed by the accredited agent of the government, the public printer, might well be evidence, and that gotten up on private speculation, and printed by *Duff Green*, not evidence, although the Secretary of the Senate may have prepared it.

But how is the court to know the contents of this book? It is not in the library at Washington, and its contents are not copied into the record, yet it will not be pretended that plaintiff below could succeed without it.

IV. The deed from Glodon and wife, and Lecompt and wife, to Penconneau was clearly bad, because it was not for the ground in suit; and were it for the right ground, it was error to give in evidence a copy, without further evidence of the loss of the original. To let in this copy, Forsyth swears that the deed went into the possession of defendant's attorneys, Manning & Merriman, and that he is informed by them that the same is lost." Suppose that when this deed was handed over to these attorneys, to prosecute this suit, they had seen on its face such erasures or other evidence of fraud as would invalidate it, and they had said: "Sir, it will never do to let this deed appear in court; it will destroy your case; but we see it has been recorded: we say to you, it is lost." Here is a copy which does not show the interlineations, and you must swear to an affidavit, which we will attach to it, stating that the original went into our hands, and that you had heard us say it was lost. Here would be a fraud, precisely such as the above decision would sustain. Record, page 18; 5 Gil., 119; 22 Ill., 445. Parkins vs. Corbet, 1 Car & Payne, 282.

V. The copy of the deed from Louis P. Penconneau and wife was inadmissible without in some more satisfactory way accounting for the original: see the above authorities.

VI. The deed from Mrs. Byrne conveys nothing: 1st, Because it contains no description that includes this property. It is for certain property that has been conveyed to one Lament Penconneau, whereas she is said to be an heir-at-law of Laurent Penconneau. N. Penconneau proves that she was

married, and there is no legal evidence that she was divorced. Marriage may be proved by verbal proof of cohabitation, but not so with a divorce. There is a record of it, and it must be proved by the record. By the laws of Illinois, the deed of a *femme covert* is a nullity, unless where she joins with her husband in the conveyance. Purple's Statutes, vol. 1, p. 162, and 1 Freeman's Dig., 554, and authorities there referred to.

VII. The chancery records, for the reasons assigned in the abstract, should not have been given in evidence. It was not voidable, but absolutely void. When a record comes in, as evidence, between third parties, I admit everything will be presumed in favor of it. The court, for the purpose of sustaining it, will presume many things that do not appear; but where the record itself shows the error complained of, the court will presume nothing against its direct statements. The following objections appear upon the face of the record:

1st. Trotier was not legally before the court. A default was taken against him because a copy of the summons was "left with a white person over the age of ten years," without saying who the person was, or whether she was a member of his family. Perhaps she was a child taken there for the purpose. Rev. Laws of 1845, p. 94, sec. 7; 2 Scam., 365.

2d. It was error to take a decree against the minors, Amable Tramble and John Herbert, junior, by default. There ought to have been answers filed by the guardians, requiring proof of the allegations in the bill. In the case of Masterson et al. vs. Wiswold et al., 18 Ill. 49, the court say: "In all cases against infants, defendants, strict proof is required." "The record must contain enough, in such cases, to sustain the divorce, whether the guardian *ad litem* answers or not."

In the case of Carr et al. vs. Fielden, 18 Ill. 81, the court say: "It has often been held by this court, that full proof is necessary in equity proceedings against infants, no matter what answer may be made for them by their guardian *ad litem*, and that the record must, in some way, contain and preserve such proof, so that upon inspection of the record, the facts appearing shall justify the decree against them."

In the case of *Ex parte Guernsey*, 21 Ill. 450, the court say: "The guardian should not have been allowed to testify in the case. He should have defended against the claim, and the court should not have allowed it, under the proof."

In *Chaffin vs. Kimball's Heirs*, 23 Ill., the court say: "The answer of the guardian *ad litem*, admitting the truth of the charges in the bill, cannot affect the infant's rights; but with respect to him, all the allegations must be proved, with the same strictness as if the answer had interposed a direct and positive denial of their truth; nor can a default, nor a decree pro con-

fesso, be entered against an infant; and see the numerous authorities referred to in these cases."

3d. But this whole proceeding is void because it was had in a county where none of the defendants lived.

The law of Illinois provides that "application for the sale of such real estate shall be made in the county where the ward shall reside, although the estate may lie in a different county. Rev. St. of 1845, 267. See also 23 Ill. Rep., 47.

4th. The copies of deeds from Glodon and others to N. Penconneau, and the one from Mrs. Byrnes, not being competent evidence, and not being effectual to convey the land in dispute if they were, cannot sustain a decree that would be void without them.

5th. This decree shows upon its face that the master, who was only employed "for the purpose of taking proofs, and reporting them to the court," decided the whole matter, and the court simply registered the decree of the master. Printed record, p. 37.

6th. I hold, that the court having a discretion as to the mode of said sale, and the master being a mere agent of the court, it was material, after the court had prescribed the time and place of said sale, and the mode of advertising it, not only that the direction in the decree be followed in every particular, but that the decree should show that it had been followed. The decree required the property to be advertised, by "giving it three weeks' notice of the time, place and terms of said sale, by *three successive weekly advertisements.*" But the record (page 42) only shows one advertisement. The decree required that "the *time, place and terms*" of the sale shall be advertised, but there is nothing in the record showing that this was done. Again, it was decreed that the notice shall be published "in some newspaper printed and published in the county of Peoria," but the record nowhere shows where this paper was printed.

VIII. The deed from Glodon and others to Laurant Penconneau on page 34 of printed record, does not convey this land. It professes to convey a lot confirmed to "Antoine Lasseur," "and bounded northwardly by a lot occupied by Louis Puinete, eastwardly by a street separating it from the Illinois river, southwardly by unoccupied lands, and westwardly by a street." The only calls from which the lot can be located and identified, are the lot confirmed to Lasseur, and having the lot of Puinete on the northerly side of it; but by reference to Cole's report and Brown's survey, it will be found that no such persons claimed lots in Peoria. The calls for the Illinois river and unoccupied lands are vague. The Illinois river is more than three hundred miles long, and nearly all the State at that time was

unoccupied land. That this is not a clerical error appears from the fact that this name occurs three times in this deed. Twice it is written as above, and once Lassure, still preserving the same sound.

It is also found on pages 15 and 16, and the name is every time written Lasseur; but the vendors in said deed are proved, by Penconneau, to have been the heirs of one Lapance.

IX. The title shown by defendant below, being senior in point of time, is the better title at law, and the remedy of the plaintiff below is in equity, and not at law.

X. The plaintiff below was bound by the statute of limitation of 1835. Rev. Laws of 1845, p. 349. This court, in the case of Bryan & Rouse vs. Forsyth, above referred to, and the Supreme Court of Illinois, in the case of Ballance vs. Tesson et. al., in 12 Ill., decided that the title in this class of cases was perfect upon the approval of the survey. If that be true in this case, the statute of 1835 applied with force. This is a much stronger case than that of Bryan & Rouse vs. Forsyth, 19 How. 334. Here there was an actual residence, not only of one family, but of many families, on different parts of the tract, who were my tenants; and this very spot of ground had long before been fenced in, as a pasture; and when a lard-oil, soap and candle factory, and butchering establishment, and dwelling-house, in which the proprietor lived, were erected on another part of said lot 63, this particular part, described in this declaration, was occupied as an appurtenance thereto.

But since the trial of this case in the court below, the supreme court of Illinois has conclusively settled this question. See Williams vs. Ballance, 23 Ill. 197. Mr. Williams sued for French claim No. 59, which lies alongside of the one claimed in this suit, and his derivative title was admitted. Defendant relied upon said statute of limitations. He had resided within his patent bounds the requisite length of time, but had never resided on the lot in controversy. He had, however, all the time, had tenants in possession, who occupied it as appurtenant to a distillery. The court say: "Did Ballance occupy the premises described in the patent since 1844, by actual residence thereon? The fact simply is that he did. But he did not reside upon every square yard of the premises, nor upon the particular lot, nor was it necessary. He resided upon the legal subdivision described in his patent, the evidence of his title, and possessed and occupied it by his tenants." This being a State law, and the highest court in the State having settled its construction, this court will, I presume, conform to it.

It may be contended, that as this lot was definitely described

in Cole's report, and as the law of 1823 contained words of present grant, no survey in this particular case was wanted, and the title passed by virtue of the act of 1823. This reasoning seems to me to be well founded. Then I reply, that the statute of twenty years' limitation bars the claim, for I had been in possession of a part of the tract, claiming the whole for more than twenty years.

XI. I insist that every instruction asked for by defendants below was good law, was applicable to the case, and ought to have been given. Surely, it was clear law "that if a man buys and resides upon a tract of land, and while in such possession buys another tract adjoining him, his possession, in contemplation of law, at once extends over the new purchase, and it becomes a part of his residence." 4 Mon. 442; 19 Ill. 241; and surely, it clearly was not law to say to the jury: "If Ballance built on one part of the quarter section, and this lot 63 was left vacant and unoccupied, and unimproved, that would not, as to that lot, constitute an actual residence." I presume it is not necessary for me to quote authorities, or resort to reason to prove to this court, that a man residing on any part of a tract, claiming the whole under any sort of a proper title, is in possession of the whole, and an actual resident of the whole.

This instruction was not only wrong, because as an abstract question it was not law, but there was no evidence in the case that justified such an instruction. There was no dispute as to whether the ground was occupied. This was fully proved; but the plaintiff undertook to show that by means of a trick practised by his witness Lincoln, he had got into possession likewise.

CHARLES BALLANCE,
For Plaintiff.



and unimproved, that would not, as to that lot, constitute an actual residence?" I presume it is not necessary for me to quote authorities, or resort to reason to prove to this Court, that a man residing on any part of a tract, claiming the whole under any sort of a proper title, is in possession of the whole, and

8th. The deposition of Ponçonneau ought to have been excluded. The deed executed by him, and given in evidence, was a warranty deed--of course; he was interested in the event of the suit. Forsyth's affidavit, by no means obviates the difficulty. It shows, first, that I had notice of the taking of the deposition, and signed an agreement that one should be taken in several cases, but there is no agreement to waive objections of substance. It is only "that the same deposition may be read in evidence, in each of the cases within named, *in the same manner* as if taken in each case separately." Secondly, that the same deposition was used in a former trial, without objections. Admit it. What then? If I think proper to allow a man to swear in his own case once, am I bound to let him do so forever? Thirdly, that no notice had been given that this objection would be made; but who ever heard of an attorney giving the opposite party notice, in advance, that an interested witness would be objected to? It was his business to produce one that was not interested. Fourthly, that said Ballance stated that he was fully aware of the facts upon which he intended to object to the evidence of said witness, for sometime prior to the commencement of the present term, of this court." When this statement was made, we are not informed, but some time in the past tense. Then why did he not take the hint & call a competent witness. Nor are we informed what facts are meant. One of